STATE OF MICHIGAN

COURT OF APPEALS

FIFTH THIRD BANK, Plaintiff-Appellee,	UNPUBLISHED December 17, 2013
v	Nos. 308830, 312217 Oakland Circuit Court
CELICIA A. ZLATKIN, Defendant-Appellant.	LC No. 2011-116037-CZ

Before: METER, P.J., and Cavanagh and SAAD, JJ.

PER CURIAM.

Defendant appeals the trial court's grant of summary disposition and attorney's fees to plaintiff under MCR 2.116(C)(10). For the reasons stated below, we affirm.

I. FACTS AND ANALYSIS

Plaintiff[1] gave defendant an equity line of credit, and used her home as collateral. Defendant failed to pay her debt due, despite the fact that plaintiff gave her notice of default and time to make the payments. As such, the trial court correctly granted plaintiff summary disposition. Defendant's arguments that the award should be set aside lack merit as a matter of fact and law.

1. PLAINTIFF'S INITIATION OF COLLECTION PROCEEDINGS

[1] Plaintiff is a successor by merger to the entity that initially issued defendant's loan. Defendant asserts that plaintiff cannot sue her for the debt, on the theory that the merged entity is the only party that can properly do so. She cites no relevant authority for this proposition. In any event, her loan document explicitly states that the lender's successors and assigns were bound by the agreement and that all rights inured to them. Defendant presents no evidence that the rights on her loan were sold to some unrelated party before the merger. Plaintiff's merger documents are thus sufficient to establish its right to the money owed on defendant's account.

The parties' contract and the Fair Credit Billing Act[2] stipulate that plaintiff was required to investigate and provide a written response to any dispute letters sent by defendant within 60 days after she received a billing statement. Defendant claims that plaintiff failed to follow this procedure when she disputed the account balance, and instead began collection proceedings.[3] However, the evidence defendant provided does not show that she disputed the balance in a timely manner—i.e., within the relevant 60 day period. Accordingly, defendant has established no genuine issue of material fact as to the initiation of collection proceedings, and lacks this affirmative defense to payment of her account. See *Quinto v Cross and Peters, Co*, 451 Mich 358, 362–363; 547 NW2d 314 (1996).

2. AFFIDAVIT OF AMOUNT DUE

MCL 600.2145 allows the debt collector to attach an affidavit of the amount due to his complaint. If the affidavit was created within 10 days before the complaint was filed, the affidavit serves as prima facie evidence of an account stated, unless defendant provides an affidavit denying the same. Creditors are thus not required to follow the procedure outlined in MCL 600.2145, but may do so to ease their evidentiary burden as to the existence of an account stated. Here, plaintiff submitted a nine month old affidavit with its complaint, which is acceptable practice under Michigan law. Defendant's arguments to the contrary misinterpret MCL 600.2145, which creates an optional, not mandatory, procedure. See *Charbonneau v Mary Jane Elliott*, 611 F Supp 2d 736, 742 (ED Mich, 2009); *Lipa v Asset Acceptance, LLC*, 572 F Supp 2d 841, 850 (ED Mich, 2008).[4]

3. NOTICE OF DEFAULT AND ACCELERATION

The mortgage document associated with the line of credit required plaintiff to send notice of default, which would allow defendant at least fifteen days to make late payments before acceleration of the loan.[5] In accordance with the agreement, plaintiff sent defendant two notices

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[2] 15 USC § 1666.

[3] In conjunction with the collection claim, defendant makes vague allegations that plaintiff charged her exorbitant interest. Yet the interest rates on her account stem from defendant's own conduct: namely, she (1) made her payments late, (2) missed several payments, and (3) fell behind on interest payments and late fees. As such, plaintiff increased her interest rate as authorized by the agreement, and put nearly all the payments she did make toward interest. Defendant has offered no alternative amount owed or identified any specific errors in the loan history.

[4] Defendant's attempt to use the nine month old affidavit to invalidate the foundation of a loan history admitted at trial is unavailing. Plaintiff provided a second affidavit that established the loan-history as a business record per MRE 803(6).

[5] Defendant's assertions that the trial court could not consider plaintiff's notices of default because they were submitted with plaintiff's reply brief, as opposed to its motion for summary disposition, are flatly contradicted by MCR 2.116(G)(5).

of default within a six week period. Defendant was also clearly aware she had defaulted—she stopped making payments. The trial court thus did not err when it found no genuine issue of fact as to whether defendant had sufficient notice of default.[6]

4. DEFENDANT'S MOTION TO AMEND HER RESPONSE AT TRIAL

Leave should be granted absent undue delay, bad faith, repeated failure to cure deficiencies, undue prejudice, and futility. See MCR 2.118(A)(2); *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 239–240; 615 NW2d 241 (2000), quoting *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973).

At trial, defendant made a motion for leave to amend her response and affirmative defenses, which the trial court denied. The court found that defendant delayed the proceedings when she: (1) ignored plaintiff's assertion in its complaint that it was a successor by merger to the initial lending institution; (2) denied the existence of any business transaction between she and plaintiff; and (3) admitted that she delayed in filing her motion because she could not locate the relevant documents pertaining to her loan account. Therefore, the trial court did not abuse its discretion when it held that plaintiff was prejudiced by defendant's unnecessary delays, and, further, that defendant's claims were futile.

Accordingly, the trial court correctly awarded summary disposition to plaintiff.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Henry William Saad

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[6] Defendant cites *Washburn v Michailoff*, 240 Mich App 669, 672–673; 613 NW2d 405 (2000) to support her position, but, again, in so doing she misstates the law. *Washburn* held that a court *may* decline to enforce an acceleration clause when there is an "honest dispute" over some aspect of the loan (the court lists an argument over the amount owed, or the identity of the payee as such "honest disputes"). *Id*. Yet defendant fails to show that there is any "honest dispute" between her and plaintiff as to the amount of the loan—in fact, it appears defendant knew the relevant payment amount, and chose *not* to pay plaintiff that amount.